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Via Electronic Mail

October 12, 2022

The Honorable Carol Fox Foelak
Administrative Law Judge
U.S. Securities and Exchange Commission
100 F. Street NE, Mail Stop 2585
Washington, DC 20549

Re: *In re Amazon, Inc. (CPSC Docket No. 21-2)*

Dear Judge Fox Foelak:

Respondent Amazon, Inc. respectfully requests leave to submit a reply to Complaint Counsel's Opposition to Amazon's motion *in limine* to exclude the Consumer Product Safety Commission's proffered expert witness, Ms. Sharon R. White.

The CPSC's Opposition contains arguments and factual contentions—including a new affidavit from Ms. White purporting to explain how her expert report was drafted—that could **not** reasonably have been addressed in Amazon's opening brief.¹ The CPSC's rules of practice grant broad discretion to the Presiding Officer to permit the filing of reply briefs.² Leave for submission of replies is routinely granted, including for evidentiary questions.³ The CPSC's injection of these new matters warrants giving Amazon an opportunity to respond.

¹ See, e.g., *Lopez v. Council on Am.-Islamic Rel. Action Network, Inc.*, 657 F. Supp. 2d 104, 108 (D.D.C. 2009) (additional briefing permitted "when the party" seeking to submit additional materials would otherwise "be unable to contest matters presented to the court for the first time in the opposing party's" papers (internal citation omitted)), *aff'd*, 383 Fed. Appx. 1 (D.C. Cir. 2010); *City of Blue Grass, Iowa v. Mediacom Commc'ns Corp.*, No. 3:17-CV-00008-CFB, 2018 WL 2085378, at *1 (S.D. Iowa Jan. 16, 2018) (granting "request to file a further responsive brief . . . over Defendants' resistance, based upon Plaintiff's representation that . . . it needs to respond to new and unanticipated arguments"); *Fedrick v. Mercedes-Benz USA, LLC*, 366 F. Supp. 2d 1190, 1197 (N.D. Ga. 2005) (noting "Court may in its discretion permit" additional briefing "such as where . . . new arguments" are raised).

² See 16 C.F.R. § 1025.1; *id.* § 1025.23(c).

³ See, e.g., *In re TK Access Solutions Corp.*, C.P.S.C. Docket No. 21-1 (April 4, 2022) (granting motion to file reply in support of motion to quash a subpoena); *In re TK Access Solutions Corp.*,

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Complaint Counsel’s attempt, for example, to rehabilitate Ms. White by introducing a new affidavit—new disclosures about the steps she took to arrive at her opinions—alone warrants a reply. Even setting aside that out-of-time disclosure, a reply is warranted. Her report offers opinions on various aspects of recall structure, including what remedy consumers should be offered,⁴ the phenomenon of “recall fatigue,”⁵ and the extent to which public messaging in coordination with the CPSC would be helpful.⁶ But Ms. White lacks the qualifications and experience to offer these opinions. She testified that [REDACTED]

Rather than defend Ms. White’s inability to answer these basic questions [REDACTED] at issue here—Complaint Counsel pretends that her expert

C.P.S.C. Docket No. 21-1 (Apr. 19, 2022) (same); *In re Zen Magnets, LLC*, C.P.S.C. Docket No. 12-2 (Apr. 2, 2013) (granting motion to file surreply) (citing 16 C.F.R. 1025.1); *see also in re Altria Group, Inc.*, F.T.C. Docket No. 9393 (May 5, 2021) (granting leave to file reply in support of motion *in limine* to exclude a witness and, ultimately, the motion *in limine* itself); *Babatu v. Jackson et al*, No. 3:11-cv-00533-L, Dkt. 67 (N.D. Tex. 2014) (granting motion for leave to file reply in support of motion to strike).

⁴ Sharon R. White, Rebuttal Expert Report (hereinafter the “White Report”) at 6.

⁵ *Id.* at 6-7.

⁶ *Id.* at 7-8.

⁷ White Dep. 128:5-11.

⁸ *See*, e.g., White Dep. 271:9-17.

⁹ *See* White Dep. 235: 3-9 [REDACTED]; CPSC Mot. for Summ. Decision at 5, 27.

¹⁰ Despite her decades-long career at the CPSC, which conducts over 300 recalls each year, Ms. White has only had direct experience on four recalls. *See* White Dep. 102:8-21; *see also Heiden Associates*, “Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation and Behavior” (July 2003) (noting that CPSC conducts approximately 300 recalls each year). Remarkably, despite being preferred as an expert witness on whether or not Amazon properly and correctly conducted its recall of the subject products, Ms. White disavowed any knowledge about any recalls other than those four in which she personally participated. *See*, e.g., White Dep. 254:4-9 [REDACTED]. *See also* Amazon Mot. to Exclude at 4, 13.

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testimony will address issues of “Engineering Psycholog[y].”¹¹ The question raised by Amazon’s motion is *not* whether Ms. White is or is not an Engineering Psychologist. The questions raised by Amazon’s motion are (a) whether Ms. White intends to testify about recalls and recall effectiveness (her report demonstrates she does¹²), and (b) whether she has the expertise to do so (her testimony demonstrates that she does *not*¹³).

Complaint Counsel likewise attacks the credibility and qualifications of Amazon’s proffered expert witness, former CPSC Commissioner Joseph P. Mohorovic.¹⁴ But *Mr. Mohorovic’s* bona fides are irrelevant to whether *Ms. White* has sufficient experience and impartiality to serve as an expert in this proceeding. As an initial matter, Ms. White must satisfy the requirements of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*.¹⁵ That is true regardless of whether Amazon does or does not offer any expert testimony at all. (In any event, Mr. Mohorovic is qualified, and his proposed testimony is admissible under the relevant standards, standards Ms. White is subject to but cannot meet.¹⁶)

Finally, Complaint Counsel’s argument that Amazon’s motion is “premature” lacks merit, and certainly could not reasonably have been addressed in the opening brief. The parties have proffered cross motions for summary decision, and presumably, Complaint Counsel will rely on Ms. White’s expected testimony to oppose Amazon’s motion and in further support of their motion. Unless Complaint Counsel is affirmatively representing that they will not invoke any of Ms. White’s opinions in those papers—instead of merely saying that they have “not yet” done so¹⁷—a ruling at this time makes good sense.¹⁸

For these reasons, Amazon respectfully requests that the Court grant Amazon’s request for leave to file a reply.

¹¹ See CPSC Opp. to Mot. to Exclude at 8.

¹² See Amazon Mot. to Exclude at 1; *see also* White Report at 15 [REDACTED].

¹³ See Amazon Mot. to Exclude at 10-15; *see also supra* note 8.

¹⁴ See CPSC Opp. to Mot. to Exclude at 4-7.

¹⁵ 509 U.S. 579 (1993); *see also* 16 C.F.R. § 1025.44.

¹⁶ Mr. Mohorovic is fully qualified on issues of recall effectiveness and consumer notification. His service as a CPSC Commissioner affords him with years of experience on setting and monitoring how well CPSC policies on recall effectiveness and consumer communications worked. His time as commissioner, of course, builds on his time working as staff at the Agency. Unlike Ms. White, Mr. Mohorovic also has significant experience in recall effectiveness outside the CPSC, providing him with a valuable, balanced perspective.

¹⁷ See CPSC Opp. to Mot. to Exclude at 1, 10.

¹⁸ *Cf.* 16 C.F.R. § 1025.1 (“Presiding Officer should, whenever appropriate, expedite the proceedings . . .”).

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Sincerely,

/s/ Sarah L. Wilson

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CERTIFICATE OF SERVICE

I hereby certify that, on October 12, 2022, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

- filed by email with the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills at amills@cpsc.gov, with a copy to the Presiding Officer at alj@sec.gov and to all counsel of record; and
- served to Complaint Counsel by email at jeustice@cpsc.gov, lwolf@cpsc.gov, and sanand@cpsc.gov.

/s/ Sarah L. Wilson
Sarah L. Wilson

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of Amazon.com, Inc.,

Respondent.

CPSC Docket No. 21-2

Hon. Carol Fox Foelak
Presiding Officer

[PROPOSED ORDER]

In this proceeding, Respondent Amazon.com, Inc. (“Amazon”) has submitted a letter requesting leave to file a reply brief in response to Complaint Counsel’s opposition to Amazon’s motion *in limine* to exclude the expert report and testimony of Ms. Sharon R. White. Upon consideration of the letter, it is hereby:

ORDERED, that Amazon’s request for leave to file a reply brief in response to Complaint Counsel’s opposition to Amazon’s motion *in limine* to exclude the expert report and testimony of Ms. Sharon R. White is GRANTED;

ORDERED, that Amazon file a reply no later than one week from the date this Order is signed; and further

ORDERED that a copy of this Order shall be entered on the docket.

Dated: _____

Hon. Carol Fox Foelak
Administrative Law Judge